INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
1. The facts of the crime	3
2. The request for the grand jury minutes	5
Argument	7
Conclusion	11

CITATIONS

Cases:	
Berry v. *United States*, 295 F. 2d 192, certiorari denied, 368 U.S. 955	6, 7
De Binder v. *United States*, 292 F. 2d 737	10
Gordan v. *United States*, 299 F. 2d 117	10
Pittsburgh Plate Glass Co. v. *United States*, 360 U.S. 395	10
Travis v. *United States*, 269 F. 2d 928, reversed, 364 U.S. 631	8
United States v. *Giampa*, 290 F. 2d 83	7
Statute:	
18 U.S.C. 1010	2
Miscellaneous:	
Federal Rules of Criminal Procedure with Notes and Proceedings of the Institute, New York University School of Law, 1946, pp. 178–180	8
3 Wigmore, *Evidence* (3rd ed., 1940) §1019	10

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 807

SIDNEY NORMAN BRILLIANT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (3 R. 1–14;[1] Pet. App. 17–30) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 2, 1962 (3 R. 15; Pet. App. 31). A petition for rehearing was denied on January 24, 1962. On February 16, 1962, Mr. Justice Whittaker extended the time within which to file a petition for a writ of

[1] The record on file with the Clerk of this Court consists of three volumes and is herein designated "R.", preceded by the volume number. Volume 1 contains the pre-trial and trial pleadings; volume 2 is the trial transcript; and volume 3 contains the proceedings in the court of appeals.

certiorari to and including March 25, 1962. The petion was filed on March 21, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether in the circumstances of this case the trial judge properly declined to make an *in camera* examination of the grand jury testimony of one of the witnesses called by the government, in order to search for possible impeaching material.

STATUTE INVOLVED

Section 1010 of Title 18 of the United States Code is set forth in the petition (Pet. 3).

STATEMENT

On October 11, 1960, a one-count indictment was returned in the United States District Court for the Eastern District of Missouri, charging that, on or about August 20, 1959, petitioner knowingly made and uttered a false statement in order to obtain a loan insured by the Federal Housing Administration, in violation of 18 U.S.C. 1010. More particularly, the indictment alleged that the false statement was contained in a credit application for an F.H.A. insured property improvement loan in the amount of $2,180, and that the statement as to the purpose of the loan was false in that some of the proceeds were to be used to pay off an automobile loan (1 R. 2–3; Pet. App. 16–17). After a jury trial, petitioner was convicted, sentenced to imprisonment for 15 months and fined $500 (1 R. 14, 18; 2 R. 163). On appeal, his conviction was unanimously affirmed (3 R. 1–14).

I. THE FACTS OF THE CRIME

A detailed statement of the evidence is set out in the opinion of the court of appeals (3 R. 1–7; Pet. App. 17–23); it may be briefly summarized as follows:

During the year 1959, petitioner was employed as a salesman for the J. & L. Construction Company, which was engaged in the home improvement business in St. Louis, Missouri (2 R. 100, 108, 114). Sometime in late July or early August 1959, petitioner called at the home of Mr. and Mrs. Frank White and offered to sell them aluminum siding for their home and to make other improvements for the price of $1,400 (2 R. 14–17). When told that the Whites could not afford the proposed improvements because they were already making monthly payments of $75 on their home and $69.80 on their car (2 R. 17), petitioner stated that he could make them "a good deal" (2 R. 18). According to Mrs. White, he said that he could arrange it so that the unpaid balance on the automobile loan would be added to the amount of a home improvement loan and the monthly payments on the combined amount would be only about a dollar more than the amount the Whites were already paying on their car (2 R. 18). Mr. and Mrs. White agreed to this arrangement.

A few days later, petitioner returned to the Whites' home and took their car payment book, stating that "he would pay it off" (2 R. 23).[2] Sometime thereafter petitioner returned the book stamped "Paid

[2] According to Mrs. White, on this occasion, petitioner also left a "paper" which she and her husband signed. It described the home improvements to be made and further stated that petitioner would pay the balance owing on the car (2 R. 20–21).

August 17, 1959 Mutual Bank and Trust Co" (3 R. 7; 2 R. 23–27).[3] On this occasion, petitioner also brought a written contract with the J. &. L. Construction Company for Mr. and Mrs. White to sign. The terms of this contract provided that the company was to furnish all the materials and labor necessary for the proposed improvements at a stated cost of $2,180; this contract did not mention the automobile loan (3 R. 4; 2 R. 28).[4] At this same meeting, petitioner also had Mr. and Mrs. White sign an already completed application for a loan in the amount of $2,180, which was purported to be for home improvements. The loan application stated that it was made to obtain credit under the National Housing Act (3 R. 5; 2 R. 31–32). Mrs. White, who had a seventh grade education, testified that she did not read the documents before she signed them (2 R. 13, 32, 52, 56–57). Mr. White, who could neither read nor write, merely identified his signature on the documents (2 R. 86–91, 93–94).

During the course of her direct examination, Mrs. White testified that several questions on the loan application contained incorrect answers and that neither she nor her husband had provided this erroneous information. For example, she stated that her husband's wages and other family income were overstated

[3] The records of the Mutual Bank & Trust Company revealed that the balance of the Whites' car loan amounting to $688 was paid on August 17, 1959 (2 R. 77–83).

[4] Mrs. White testified that when petitioner brought over this contract, she returned the paper she and her husband had originally signed which provided that petitioner would pay off the automobile loan (2 R. 20–21, 27).

although she had correctly informed petitioner as to these matters (2 R. 33–35); that the application incorrectly stated that the Whites derived income from the rental of a downstairs apartment at their premises, when in actual fact no such apartment existed and petitioner had never been so informed (2 R. 35–36); and that, although the application stated that their home cost $8,500, petitioner had been told that it cost $7,500 (2 R. 36–37).

The defense introduced no evidence.

2. THE REQUEST FOR THE GRAND JURY MINUTES

At the conclusion of Mrs. White's direct testimony, counsel requested that the government produce any statements she had given the government and also the "grand jury testimony of this witness." The government agreed to produce a statement given by the witness but objected to production of the "grand jury transcript because there is no showing of a necessity for that" (2 R. 40). At this juncture, defense counsel modified his request asking that the trial court examine the minutes *in camera* "to determine whether or not the defendant should be allowed to see the testimony or any portion thereof, or whether this testimony * * * could be used by the defendant in cross examination of this witness" (*ibid.*).

The court ordered production of the statement, but declined the request for the grand jury minutes (2 R. 40–41). The government supplied petitioner's counsel with a signed statement which had been given by the witness to the F.B.I. sometime before her grand jury testimony (2 R. 42). There then followed

lengthy cross-examination of Mrs. White (2 R. 43–74, 76) in which petitioner's counsel made repeated use of the statement in an attempt to impeach her testimony (see, *e.g.*, 2 R. 43–49, 57, 62–63, 64–65, 71). Toward the close of the cross-examination, petitioner's counsel sought to question the witness about her grand jury testimony (2 R. 66–67). His purpose, he advised the court, was to determine whether the witness had informed the grand jury of "the alleged false information which is contained in the credit application * * *" (2 R. 69; see also 2 R. 67–68). The trial court refused to allow counsel to pursue this line of inquiry, because it "would call for nothing but the conclusion of the witness * * * [and] is outside the scope of the direct examination" (R. 69–70). The court also advised defense counsel, "You can't impeach a witness by the witness' own testimony on the stand * * *. You have to ask the witness if she made such and such a statement at such and such a time" (2 R. 70; see Pet. 7–10).

In its opinion affirming the rulings of the trial court, the court of appeals relied upon its recent decision in *Berry* v. *United States*, 295 F. 2d 192, certiorari denied, 368 U.S. 955. It pointed out that *Berry* involved "a somewhat similar situation" in which it had "discussed the present state of the law as to grand jury minutes" (3 R. 13–14; Pet. App. 29–30). Noting that in this case the petitioner had the benefit of a "long and detailed statement" given by Mrs. White to the F.B.I., which differed in "no material respect" from her trial testimony, and that no particularized need had been shown for the grand jury testimony,

the court held that the trial judge had not abused his discretion when he refused to examine the testimony *in camera* "for possible inconsistencies" (3 R. 14; Pet. App. 30).

ARGUMENT

This case presents the same issue as to which the Court denied review in *Berry* v. *United States*, 295 F. 2d 192, certiorari denied, 368 U.S. 955—whether, where no particularized need is shown, the trial court may refuse to inspect the grand jury testimony of a witness called by the government for possible impeaching material. Under the circumstances, the factors set forth in the government's brief in support of the denial of certiorari (No. 568, this Term, pp. 6–10) are equally pertinent here and warrant similar action by this Court. As stated therein, the prevailing—and we believe proper—rule in the circuits is that, where no particularized need is shown for disclosure of the grand jury testimony, the trial judge is not required to interrupt the regular course of the trial to examine such testimony merely to determine whether it might be inconsistent in some respect with the witness' testimony at the trial. Moreover, as further discussed in our brief in *Berry*, while the Second Circuit has fashioned a procedure which deviates from this approach, holding that, upon a request of defense counsel, the trial judge must look at the grand jury testimony of any prosecution witness and turn over those parts which contain inconsistencies (*e.g.*, *United States* v. *Giampa*, 290 F. 2d 83, 85), such deviation, in large measure, stems from regional differences in procedure as to the

transcription of grand jury minutes.[5] In any event, the instant case does not provide an appropriate vehicle for resolution by this Court of any conflict between the Second Circuit rule and that of the other circuits.

At the conclusion of Mrs. White's direct examination, defense counsel was given a "long and detailed statement" (3 R. 14) made by the witness to the F.B.I. some months prior to her grand jury testimony. Counsel made extensive use of this document in his cross-examination of the witness, repeatedly referring to it in an attempt to impeach her trial testimony. Despite counsel's persistent efforts in this regard, only inconsequential differences were developed (see, *e.g.*, 2 R. 43–49). As the court below observed, the statement differed "in no material respect from [Mrs. White's] testimony at the trial" (3 R. 14). It is unreasonable to suppose that a witness would depart from the tenor of a previously recorded sworn statement in a later appearance before the grand jury only to return to the substance of the earlier statement in testimony at the trial. The more reasonable inference in such circumstances is that on all three occasions a basically consistent version of the events was given. See *Travis* v. *United States*, 269 F. 2d 928, 945 (C.A.

[5] In New York, grand jury testimony is normally transcribed. On the other hand, except for particular types of investigations—such as antitrust actions—relatively very little grand jury testimony is recorded in other parts of the country. See discussion in *Federal Rules of Criminal Procedure with Notes and Proceedings of the Institute*, New York University School of Law, 1946, pp. 178–180.

10), reversed on other grounds, 364 U.S. 631. Since defense counsel was given the earliest statement of events by the witness, it was unnecessary for the court to inspect the later grand jury testimony.

Furthermore, in this case, as in *Berry*, the only contested issue was a narrow and simple one—whether petitioner was responsible for the fraudulent loan application, submitted for F.H.A. approval. Unless Mrs. White had testified before the grand jury (as she testified at trial) that petitioner had proposed and carried out the arrangement to pay for the car, and had been responsible for the erroneous information contained in the loan application, it is inconceivable that petitioner would have been indicted.

There is no merit to petitioner's attempt to find in the indictment a suggestion of an inconsistency (Pet. 14). He argues that because Mrs. White testified at the trial to a number of false statements in the loan application, whereas the indictment specified only the fact that the proceeds were to be used to pay off the automobile loan, Mrs. White's grand jury testimony must have been different from her trial testimony. That the drawer of the indictment chose to rely upon the salient and essential falsity which was at the heart of the case, and not to specify minor details, hardly suggests that the witness' testimony was inconsistent.

Petitioner contends further (Pet. 14) that he was precluded from showing a particularized need because the trial court cut off his cross-examination of Mrs. White as to whether she had "stated the same things"

to the grand jury as in her trial testimony (2 R. 67–68). Apart from the fact that the trial judge was quite correct in ruling that this was not the way to show prior self-contradiction (R. 69–70; see 3 Wigmore, *Evidence* (3rd ed., 1940) § 1019), petitioner misconceives the elements which constitute a showing of particularized need. A preliminary showing of inconsistency is not necessary. See *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 401. Rather, the elements of particularized need relate to broader considerations as, for example, the nature of the charge, the significance and quality of the witness' trial testimony, whether the witness has made pre-grand jury statements which were available to defense counsel—in short, whether an appraisal of the witness' trial testimony within the framework of the entire case indicates that further probing of the direct testimony is necessary. Cf. *De Binder* v. *United States*, 292 F. 2d 737 (C.A.D.C.); *Gordan* v. *United States*, 299 F. 2d 117 (C.A.D.C.). In this case, no such further probing was necessary. The grand jury testimony of Mrs. White could have had very little significance at the trial since the witness was subject to a searching cross-examination on the basis of her detailed statement to the F.B.I. and her trial testimony. Moreover, despite protracted cross-examination, the witness steadfastly maintained that petitioner was responsible for the information contained in the loan application and no evidence was submitted by the defense to contest her version of the events. In sum, no need was revealed for production of the grand jury testimony of this witness.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.
Assistant Attorney General.
BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

APRIL 1962.

U.S. GOVERNMENT PRINTING OFFICE 1962